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No. 4585

# United States Circuit Court of Appeals

## EIGHTH CIRCUIT

JAMES J. BROUGHAM et al.
Appellants

vs.

BLANTON MANUFACTURING COMPANY
Appellee

Appeal from the District Court of the United States
for the Eastern District of Missouri

## STATEMENT AND BRIEF FOR APPELLEE

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*Copy of within Statement and Brief received this first day of December,* 1916

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IN THE

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*Appellee*

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## STATEMENT OF THE CASE FOR APPELLEE

This is a suit in equity wherein appellee, as plaintiff, obtained a decree against the defendants (who are the local officers at St. Louis, Missouri, in charge of the federal Bureau of Animal Industry in that City) perpetually enjoining them from attempting to deprive plaintiff of the use of its trade-mark "**Creamo**", as applied to oleomargarine manufactured by plaintiff in St. Louis and shipped into other States as part of interstate commerce.

The case made by the bill will, for greater brevity, be outlined shortly, along with the facts in evidence, the most of which are undisputed.

The answers of defendants admit

> "that plaintiff has been for many years, and is now, a manufacturer of oleomargarine; that plaint-

iff has sold oleomargarine and offered it for sale in packages of various sizes and labeled or marked with the trade label or stencil 'Creamo' " (Rec. p. 14).

The answers then disclaim any knowledge of the value of plaintiff's trade-mark or of its prior approvals alleged, as well as any knowledge of many other facts averred by plaintiff; and then for defense set up that the Secretary of Agriculture (as the head of the Department of which the Bureau of Animal Industry forms a part) has been willing to approve the label of plaintiff

> "providing plaintiff would place upon said label suitable words indicating that the words 'Creamo Oleomargarine' constitute merely a trade name or brand, and the Secretary of Agriculture offered to approve said label modified so as to read 'Creamo Brand Oleomargarine', providing said label should be used only upon oleomargarine containing not less than 10 per cent of cream" (Rec., p. 17).

It is then alleged in the answer that

> "plaintiff has refused to modify its said label as requested by the Secretary of Agriculture, and that plaintiff has used said label upon its said oleomargarine as aforesaid, for the purpose of deceiving and causing the purchasers thereof to believe that the said oleomargarine produced by it is made from and contains a substantial quantity of cream; and plaintiff by the use of said labels, and by the use of advertising matter and letterheads sent to its customers, has succeeded in inducing the belief on the part of said customers that said oleomargarine is manufactured from and contains a substantial quantity of cream, whereas in truth and in

fact large quantities of the oleomargarine manufactured and sold by plaintiff under said label and trade name has contained no cream, and such of its product as has contained cream not over 10 per cent of cream, and all of its product, both that containing cream and that containing no cream, has been sold under the same label and trade-mark described in the bill of complaint.

And defendants say that because of the facts aforesaid, the said label, as so used by plaintiff, is deceptive and misleading, and that the Secretary of Agriculture, in exercising the discretion and judgment vested in him by law, has determined that said label is deceptive and misleading, and in consequence thereof has disapproved of said label and its use in connection with the manufacture and sale of plaintiff's said product" (Rec., p. 18).

The answer then recites that defendants, as officers of said Bureau, notified plaintiff that the use of said "trade name and label would not be allowed after the 1st day of March, 1914," but intended that plaintiff thereby should understand that after said date defendants would refuse to attach to packages of such manufacture the Government stamp of inspection, etc., (Rec., p. 18).

**A provisional rule to show cause** was duly issued (Rec., pp. 13-14) and the suit came on later for trial before his Honor, Judge DAVID P. DYER, at which time plaintiff introduced considerable testimony in support of the case made by its bill.

## Plaintiff's Case

Plaintiff is duly incorporated as a manufacturing company, and has been for many years engaged in the

manufacture of oleomargarine in the City of St. Louis. In that business plaintiff and its commercial predecessors have been using since about 1902 (Rec., p. 33) a trade-mark, to designate the oleomargarine of its manufacture: the word **"Creamo"**, always used in connection with the name of oleomargarine to describe the product on or to packages of which said trade-mark is attached or affixed, in trade, and specifically in interstate commerce carried on by plaintiff with customers in many other States outside of Missouri.

Long before the enactment of the Act of Congress of June 30, 1906 (34 Stat. 674) for inspection of "meat and meat food products", plaintiff had adopted and used this trade-mark *"Creamo"* on packages of its oleomargarine under the regulations of the COMMISSIONER OF INTERNAL REVENUE (approved by the Secretary of the Treasury) to whom was entrusted by the Act of Aug. 2, 1886 (24 Stat. 209) the making of regulations to govern the marking, stamping and **branding** of the packages in which such oleo was contained for sale (Sec. 6, Act Aug. 2, 1886).

The trade-mark *"Creamo"* was approved by the Commissioner of Internal Revenue as a brand for oleomargarine, which appears by his letter in evidence (Rec., p. 29) of date, January 19, 1904, to the U. S. Internal Revenue Collector at St. Louis, through whom the application for approval was made.

Afterwards the **Department of Agriculture**, during the administration of Mr. Secretary JAMES WILSON (Rec., p. 82), by letter to plaintiff from the local inspector in charge of the Bureau of Animal Industry in St. Louis, under orders of his superior, May 24, 1907 (Rec., pp. 30-31), approved the trade label **"Creamo**

**Oleomargarine**", and again, in the same way, the Department gave an equally direct and emphatic second approval, July 8, 1912 (Rec., pp. 12, 46). The plaintiff after such approval by both Departments applied on January 6, 1908, for registration of its trade-mark ("*Creamo*" for oleomargarine) at the Patent Office of the United States (Rec., p. 46) and registration was duly accorded June 9, 1908, as appears by the certificate and record thereof in evidence (Rec., p. 47).

Plaintiff had duly paid the ($600) **annual internal revenue occupation tax** as oleo manufacturer (Rec., p. 34) and had conformed to all the regulations applicable (Rec., p. 34). The judicial notice of the Court (Rec., p. 38) was directed to the *Regulations* of the COMMISSIONER OF INTERNAL REVENUE, which are authorized by the law applicable especially to oleomargarine. Those regulations prescribe (with much detail) the form and terms of labels and marks on oleomargarine packages put up by the manufacturer.

Several of those regulations refer specifically to the brands of the manufacturer, and among them we note these:

> "All letters and figures affixed must be legible, and must be of such width and of such color as the collector of internal revenue may designate."
>
> "The above brand must be on the top only of each package" (referring to forms of label shown in another part of the same regulations, pp. 39-40, requiring the trade name of the product "*Oleomargarine*" to appear, in letters not less than ¾ of an inch in length).
>
> "The use by oleomargarine manufacturers, or dealers, of any private trade-mark, label, brand, picture, illustration, or other advertising or de-

scriptive device upon any print, roll, or other mold or design of oleomargarine offered for sale, consumption, or use, or upon any wooden or paper package or wrapper of any print, roll, or other mold or design of oleomargarine which conceals, or tends to conceal, the fact that the product is oleomargarine, is hereby prohibited."

"Under this regulation it will be seen that the use on statutory or other packages of oleomargarine of any trade-mark, label, brand, picture, illustration, or advertising or descriptive device indicating the oleomargarine to be a product of the dairy, or calculated to induce the belief that it is such dairy product, is inadmissible."

U. S. Int. Rev. Reguls. "Oleomargarine" (No. 9, Revised July, 1907) pp. 39-40

The foregoing regulation was referred to and part of it quoted (Rec., p. 38) at the trial.

It was in proof, without dispute, that the trade-mark "**Creamo**" was of great value; some experts in the business placing its value as high as $250,000 (Rec., p. 73) and others at "many fold" the amount spent to advertise and publish it, which amount was shown to be in 1913 about $10,000 per year (Rec., p. 71), and an average of $7,500 per year for ten years (Rec., p. 43).

The correspondence between plaintiff and the Department of Agriculture in 1914 was read showing that defendants as U. S. officers thereof notified plaintiff they would not pass or certify as inspected the plaintiff's product, intended for interstate commerce, unless plaintiff changed its trade-mark to "*Creamo Brand Oleomargarine*" (Rec., pp. 50, 60, 61, 62) which would have impaired fatally the utility of the trade-mark and destroyed its value as the undisputed testimony demonstrates (Rec., pp. 51, 62).

There was testimony (uncontradicted) that plaintiff had gone to great expense to advertise this special brand of oleomargarine; that from a small beginning the plaintiff's business had grown 500 per cent. to an annual volume of approximately $500,000, of which two-thirds was of goods of that brand; and the sales extend from Boston to California (Rec., p. 41).

**The Defense**

consisted of quotations from the *Meat Inspection law*, and **Regulations**, the main features of which relied upon are the following:

Part of the Act March 4, 1907, ch. 2907:

> "No such meat or meat food products shall be sold or offered for sale by any person, firm or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted." (34 Stat. L. 1262.)
>
> Fed. Stats. Annot. (Supp. 1909) p. 48.

Of the Regulations of the Department of Agriculture (Bureau of Animal Industry), May 1, 1908:

> "Section 10. No meat or meat food products shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products, which are not false and deceptive and which shall be approved by the Secretary of Agriculture, are permitted."
>
> Regulations (1908) p. 28, sec. 10

Defendant put in evidence some further regulations,

but as they are not relied upon in the learned Brief for the Government, we need not quote them.

Defendants also introduced some oral testimony:

One of the defendants, Dr. Brougham, admitted the purpose of his Department to be to refuse to certify as inspected for interstate shipments the oleomargarine products of plaintiff's factory if they bore the brand "**Creamo**" Oleomargarine, pursuant to his orders from his Department Chief on that subject (Rec., pp. 80-83).

There was no testimony that any one had ever been deceived or misled by the trade-mark "*Creamo*" on packages of Oleomargarine, or had ever supposed it to be cream or made from or of cream.

There was so little conflict of evidence that the suit is practically one of undisputed facts.

## Perpetual Injunction

After the trial, argument and submission the learned trial Judge made the injunction prayed perpetual, as shown by the record, enjoining defendants

> "from attempting to deprive plaintiff, its successors and assigns, of the use of said brand, trademark and label described in said bill of complaint, used upon packages of Oleomargarine manufactured, packed, sold or offered for sale by said plaintiff, its agents, successors, assigns or customers, in the prosecution or course of the business now conducted by plaintiff as manufacturer and vendor of Oleomargarine"; etc. (Rec., p. 20).

(At the time of the decree the learned Judge filed a statement of his views.)

**Memorandum Opinion of the District Court**

(April 27, 1914, Rec., p. 19)

DYER, J.

"The complainant now is, and for many years last past has been, engaged in the manufacture and sale of oleomargarine in the City of St. Louis, and State of Missouri. The business of the complainant has steadily grown until its proportions are now very great. This, in spite of the fact that the annual license tax amounts to six hundred dollars, and in addition thereto a tax of ¼ of one per cent on each and every pound of white or uncolored oleomargarine manufactured by it, and ten cents a pound on each and every pound of colored oleomargarine manufactured by it, is imposed by law. The license tax of $600.00 per annum has to be paid at the beginning of each year, and the tax imposed upon each and every pound of white and colored oleomargarine has to be paid by the manufacturer before it is removed from the factory. Failure to comply with these requirements is followed by heavy penalties imposed upon the manufacturer. No package is allowed to leave the place of manufacture without being plainly marked 'Oleomargarine'. Failure to comply with the law in this regard imposes heavy penalties upon the manufacturer also. As far as the evidence shows in this cause the complainant has at all times complied with the law.

"Prior to 1904 the complainant began the use of a brand or 'trade-mark' upon portions of its product, in the form following:

"The Blanton Co.

St. Louis.

Creamo

Oleomargarine.

"This 'trade-mark' or brand (from the proof in the case) seems to have been approved by the Commissioner of Internal Revenue on the 19th of January, 1904.

"After the meat inspection act was passed, June 30, 1906, the complainant submitted the same brand to the Bureau of Animal Industry, and it was officially approved by it, as shown in a Department letter dated May 24, 1907, signed by Rice P. Steddon. To this letter is attached a sample of the label, which in all respects is the same as the one appearing in the bill of complaint in this case.

"The evidence shows that for more than five years the complainant used this label upon its products, not only without objection upon the part of the proper officers of the Government, but with their approval.

"An attempt, it appears, is now made by those in authority to reverse the decisions of their predecessors and to require a change to be made in this particular brand or 'trade-mark.'

"The complainant has expended large sums of money in advertising and popularizing its product, covered by such brand. It would be inequitable upon the part of the Government and its officers to stand by, approve and acquiesce in this brand for five or six years, and then, at great loss

to the complainant, refuse further to let its product be sold under this same brand.

"The complainant is entitled to the relief prayed for in its bill. An order to that effect will be entered" (Rec., pp. 21-22).

The defendants appealed from the decree and assign certain points as supposed errors (Rec., p. 23), which will be discussed, so far as may be necessary, in our Brief.

### Joinder in Error

The appellee by its solicitors and counsel say there is no error to the prejudice of appellants in the record and proceedings of said District Court in said cause as by appellants assigned, or otherwise, and accordingly appellee prays that the decree herein may be in all things affirmed.

## BRIEF OF THE ARGUMENT FOR APPELLEE

Plaintiff has had the use of the trade-mark, "Creamo", on oleomargarine of its own manufacture for many years; has expended large sums to increase its original value, after double approval by the Internal Revenue Department of the Treasury and by the Department of Agriculture, during former administrations from 1904 (Rec., p. 29) to 1912 (Rec., pp. 12, 31, 46). After having built up a good and growing trade, made large investment of capital, time and effort, a new set of federal officers, in 1914, under a different Secretary of Agriculture, suddenly attempt to sweep away the earnings and good will acquired in this trade-mark and demand its surrender, under penalty of withholding the certificate of local

inspection of the Bureau, without which certificate the transportation companies would not accept plaintiff's product for shipments in interstate commerce. As plaintiff's trade in this article, under this brand, has become of considerable value and has expanded throughout the United States, there was no alternative to parry such an attack on plaintiff's property rights in its trade-mark, except by resort to the court in the form described in the bill for injunction and relief, on which the learned Judge below accorded the relief needful to protect the rights of the plaintiff.

The points to be met, in the review sought in this Court by the Government, may be briefly treated along with our counter-propositions.

I

**Defendants' claim that the Secretary of Agriculture is vested with exclusive authority to determine whether the trade-mark, "*Creama*", is false or deceptive.**

**We deny it, and also answer that the claim does not meet our case.**

Several phases of that claim of defendants must be considered:

*a.* What is meant by "*trade name*" in the Meat Inspection law? Does it refer to trade marks or to the name by which the product is known to the trade, as meat, grease, lard, oleomargarine, etc?

The regulations (sec. 10) quoted by the learned counsel for the Government should be read in connection with other sections which refer to trade labels and show the difference between a trade label and a trade name. We quote both, presently:

"Section 10. No meat or meat food **products** shall be sold or offered for sale by any person, firm or corporation under any false or deceptive name; but the established trade name or names which are usual to such products and which shall be approved by the Secretary of Agriculture, are permitted."

The "product" in our case is Oleomargarine. That is the true and only name of the product. Our label or trade-mark is "*Creamo*", intended to identify to the trade the product, Oleomargarine, as made by plaintiff. That label is strictly in conformity to the regulations, two of which (in the same Article No. 18, and also in the defendants' testimony, Record, p. 76) define a trade label thus:

**Regulation** 18. TRADE LABELS (Regulations, p. 26; Record, p. 75):

SECTION 1. Upon each * * * "receptacle or covering containing any meat or meat food product, which meat or meat food product does not bear the marks 'Inspected and Passed', there shall be securely affixed, under the supervision of a Department employe, a **trade label** before such meat or meat food product leaves an official establishment. This trade label shall contain, in plain letters and figures of uniform size, the words '*U. S. Inspected and Passed*', the number of the official establishment at which the meat or meat food product is last processed, and the **true name of the meat or meat food product contained in such package.** The words "under the act of Congress of June 30, 1906", may be placed upon the label after the words 'U. S. Inspected and Passed'. An inspector shall not allow trade labels to be affixed until he is satisfied that the contents of the package are

**sound, healthful, wholesome, and fit for human food, in accordance with the statements on the label.**" * * *

"Section 5. The essential features of a trade label are as follows, and shall appear upon each label:

The true **name** of the *product*.
The inspection legend
The establishment number."
(The *display* **type** is ours)

So that, under the evidence in this record, plaintiff fully conformed to the Meat Inspection law, whether or not it be held applicable to the branding or labeling of Oleomargarine packages.

The particulars of the evidence disclose how earnestly plaintiff attempted to avoid any controversy, appreciating how serious any difference is between a manufacturer of Oleomargarine and any Bureau or Department of the Government. Yet when this suit was brought, there seemed no other alternative.

The trade name of the product of plaintiff is on every package: "Oleomargarine", and the label describing it conforms to sections 1 and 5. The trade-mark "Creamo" is not part of the name of the "**product**", but is a proprietary term to identify it and distinguish it from the same general sort of trade "product" produced or made by others.

This topic was recently well treated in a case in this Court, in which the same law was involved, and the Court held that "the Secretary of Agriculture has nothing to do with the name of an article so long as it is not false or deceptive".

Packing Co. v. Houston, 215 Fed. 560,

The same decision approves a statement of the law in a well-known treatise as follows:

"'Trade-names have been frequently confused with trade-marks, and, broadly considered, they do include names which may constitute technical trade-marks. More accurately, however, trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive. Exclusive trade-names are protected very much upon the same principles as trade-marks, and the same rules that govern trade-marks are applied in determining what may be an exclusive trade-name. Non-exclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value'."

38 Cyc, 764

Cady v. Schultz, 19 R. I. 193 (32 Atl. 915)
Fairbank Co. v. Soap Co. 102 Fed. 327
Laundry v. Bank, 120 Iowa 1 (94 N. W. 262)

Those comments on the law well expound the meaning of "trade-names" (as used in the Meat Inspection law), as distinguished from trade marks. The statute and section 10 of the regulations of the Department of Agriculture forbid false or deceptive trade names. Sections 1 and 5 clarify the meaning of the other provisions and should be read as part of them. "The *true name* of the **product**", prescribed by section 5,

therefore, satisfies the meaning and intent of the law. Here the "product" is oleomargarine. The word "*Creamo*" (in connection with it) designates the maker whose trade-mark it is, according to the principles governing the law of trade-marks, briefly expressed thus:

> "A 'trade-mark' may be defined as a symbol, consisting in general of a picture, a label or a word or words, applied or attached to the goods of a trader for the purpose of distinguishing them from the similar goods of other traders, and of identifying them as his goods, or as those of his successors, in the business in which they are produced or put forward for sale."
>
> Ency Brit. (11th ed.) "*Trade-marks*"

> "**Trade-mark.** A distinctive mark, motto, device, or emblem, which a manufacturer stamps, prints, or otherwise affixes to the goods he produces, so that they may be identified in the market, and their origin be vouched for."
>
> Black's Law Dict. "*Trade-mark*"

The term "trade name" is occasionally used in other senses, explained recently (1911) by an eminent writer. It may be the trading name of a person, firm or of any business association by which good-will has been built up, "although when used as a name, and not as a mark on vendible goods, it is not used as a trade-mark" (p. 275). Then a trade name may be applied to goods of one proprietor or maker when by long use that name has "come to mean" his goods, "though it is not, and never was, impressed on the goods themselves" so as "to be a trade-mark, properly so called, or within the recent statute" (p. 276). "It cannot be said to be gen-

erally admitted that a right of property can be acquired in a trade name" (p. 277); but its proper acquisition and use may lay a foundation to apply the principles of the law of unfair competition in case of piracy thereof by a competitor, beyond the incidence of the law of trade-marks. The "Camel hair belting" case is an illustration of that rule.

Sebastian, Trade-marks (5th ed.) 275-8
Reddaway v. Banham (1896), A. C. 199

All these careful anatomists of meaning, in this field of jurisprudence, agree that, while a trade name may have a certain status and value of its own in the commercial world, it does not thereby become a trade-mark. So that when the Meat Inspection law refers to "labels" and to "trade names" to describe the "product", which must be what it purports to be, a genuine trade-mark, original, arbitrary, fanciful and attractive, is not prohibited, but rather encouraged by the Meat Inspection Act, which should be accepted and interpreted so as to encourage and promote the use of trade-marks and other legitimate modes of extending commerce and stimulating individual efforts toward advancing honest business.

*b* But if this trade-mark is within the range of section 10 as quoted, what then?

Was that mark approved by the Secretary?

It was twice approved, first, in 1907 and again in 1912.

Let us then ask: where is the law to be found to authorize a Secretary to **revoke** an approval by a former Secretary? We know of no such law. On the contrary, the power to approve does not include power in a later incumbent of the same office to undo that ap

proval, after the party interested has invested large sums on the faith and in reliance upon that action of the approving Department.

Lane v. Watts, 234 U. S. 525
Jamestown v. Ry., 177 U. S. 130
Noble v. Logging Co., 147 U. S. 165
U. S. v. Ala. R. R., 142 U. S. 621
Emblen v. Land Co., 94 Fed. 710

We shall recur to this point later, in another connection.

*c* There is not a particle of evidence that "Creamo" as a trade-mark is "false or deceptive". The answer makes such a charge (p. 27), but no proof was introduced to support it, and it is obviously groundless. If any proof was to be had, we may be sure it would have been forthcoming.

*d* Even if the power was lodged in the Secretary to revoke an approval of such a trade-mark, there is nothing in the law or in any Act of Congress conferring conclusive jurisdiction in that matter. Clear terms would be necessary to remove the exercise of such power from the review of the courts. The issue would yet remain as to whether the trade-mark was, in fact, false or deceptive. Every well-organized and efficient court would normally assume that the owner of such property was innocent of such falsity or deception, until at least some testimony was produced tending to prove the contrary. Here there is none.

II

**The claim by defendants that the trade-mark "Creamo" is false or deceptive is without merit even if it be regarded as a trade-name.**

The only defense advanced is the claim that this trade-mark as applied to Oleomargarine is "false and deceptive." Yet the Government has proposed (in the correspondence read in evidence) to approve the use of the word "**Creamo**" if the word "*Brand*" was added thereto on the label; just as if anybody could imagine the word "Creamo" to be anything else but a "brand" of something; in this case, of **Oleomargarine! The suggestion to add the word** "brand" is like a proposal to paint the word "cow" on the animal itself in some great picture where that animal figures! It is like "painting the lily" or gilding refined gold.

The plaintiff's trade-mark "Creamo", as applied to Oleomargarine, was approved in 1904 by the Commissioner of Internal Revenue by the letter in evidence, already cited.

That was before Meat Inspection by the Bureau of Animal Industry began, and before the enactment of the Act therefor, June 30, 1906. After the latter Act went into effect, plaintiff was required by the officers of the new Bureau to submit its brand to that Bureau for approval; and the form now in use on the chief label (identical with the one copied in the bill of complaint herein) was officially approved by that Department in the letter of May 24, 1907 (which was read in evidence), signed by the Chief of the Inspection Division (Rec., p. 30). To that letter is attached a sample

of the label bearing the trade-mark ever since and now in use thereon, same as appears in the bill of complaint in this case. The approval of the Department required a slight amendment in the language appearing on one of the lesser panels of the label, and to that direction the plaintiff conformed at once, and has ever since obeyed. That approval was in May, 1907, during the administration of President Roosevelt, while Hon. James Wilson was Secretary of Agriculture.

The plaintiff, having thus obtained the approval of its trade-mark and brand by two Departments of the United States Government, viz: the Internal Revenue Department and the Bureau of Animal Industry, thought itself safe in offering its approved trade-mark in another Department, where, upon an application, filed in Jan. 1908, registration thereof by the Patent Office was accorded in June, 1908, under the federal law.

From the time of beginning the use of this trade brand "Creamo" until Aug. 1912, no objection thereto was interposed by any of the Departments. Meanwhile, on the faith of these approvals, and believing they were correct and just, plaintiff expended a great deal of money in pushing and extending its trade in Oleomargarine under that brand. That brand was advertised far and wide; and after the Internal Revenue Department (Feb. 24, 1908) upon amending the regulation of 1907 (T. D. 1323) permitted manufacturers to put up this product in small packages (of 1, 2, 3 and 5 lbs.) in cartons (such as are shown by the evidence here) so that the consumer can now receive and recognize the original package with the maker's *own mark* or brand thereon, the use of

the latter became much more of a trade asset, and has now acquired so substantial an importance and pecuniary value, that plaintiff felt obliged to protect it against the undue activity of the present Bureau of Animal Industry, in trying to reverse the ruling of former administrations on the same *identical facts.* Because, since 1904, the mark "Creamo" as applied to this product has been the same sort and kind of a brand, all the time.

The Government contention was that the label should be changed to read "Creamo Brand Oleomargarine." There is undisputed evidence in the record that such a change would greatly damage the value of the trade-mark. It would really be compelling plaintiff to adopt a new mark, and build up again (if it could be done) the labor of years. The word "Creamo" is obviously a brand for Oleomargarine, as "Cremo" is also a well-known brand for cigars, and "Cream of Wheat" is a brand for breakfast food and "Cream Baking Powder" is a brand for baking powder. These brands have never been held to arouse, in either instance, a deceptive suggestion or suspicion to or on the part of the trading public that either is composed, in whole or in part, of cream. They are only trade brands as is this of the plaintiff.

No evidence is before the Court to indicate that any person, whether customer, dealer or spectator, has ever bought the article or seen or used it on the supposition that it is a cream product.

In a recent decision of the Supreme Court in U. S. v. Lexington Mill Co., known as the Bleached Flour Case (Feb. 24, 1914) No. 538, Oct. T. 1913, the United States Supreme Court has sustained this theory in regard to cases brought under the Pure Food Law. In

that flour case it is held that while it might be possible that consumers of bleached flour could be poisoned, yet it was necessary that the Government should prove that the flour so bleached was actually poisonous and injurious to the public health, in order to warrant disapproval, and that ruling was cited later in the Coca Cola case (241 U. S. 265).

That the trade word "Creamo", as used by plaintiff on Oleomargarine, does not imply that it is made from cream is more plain from the testimony, given in this case, that the Government officers (in one of their demands for a change in plaintiff's existing label) proposed that plaintiff might insert the words: "Contains No Cream" (following "Creamo Brand Oleomargarine"); but that would not always be true, for sometimes some cream is used in making this product.

The brand "Creamo", while it is arbitrary, original, fanciful and not generic, attempts to give a new, clean, unique and pure trade brand to the product of plaintiff's manufacture. Many examples of valid trade-marks are familiar in the decisions. The best of such devices are those which carry some suggestion of a pretty, or happy or romantic idea or thing. There is nothing improper or illegal in that characteristic of such trade labels whose very purpose is to be attractive within the range of truth and fair dealing.

We mention a few:

"Cream baking powder" (37 App. D. C. 137)
"Cream baking powder" (8 Biss. 398)
"Cream Rolled Oats" (171 Fed. 989)
"Swan down", complexion powder (85 Fed. 774)
"Vienna Bread" (in N. Y.) (62 How. Pr. 92)
"Purity" oleo (83 Off. Gaz. 295)

The evidence shows that plaintiff, in 1908, obtained

of the Commissioner of Internal Revenue a modification of the oleomargarine regulations, so as to permit that product to reach the consumer in small packages bearing this brand; and thereby helping to protect the manufacturer and the Government against fraud, and to secure the direct appeal of this trade-mark in a business way to the customer, as to every retail package. That regulation is now as follows:

Intern. Rev.

T. D. 1323 (Oleomargarine)

Circular of Feb. 24, 1908.

The change is shown therein in these words:

> "Manufacturers are not permitted to put up oleomargarine in wooden, tin, or stone packages as subdivisions for domestic use. The use of paraffined wrappers or cartons for prints or bricks to retain the flavor and form of the contents is permissible, provided such packages taken separately are not safe or suitable for transportation, and are marked, stamped, or branded as required by the regulations relating to wrapper covering any brick, print, or roll of oleomargarine."

The above regulation is a substitute for sec. 5 (page 39), U. S. Int. Rev. Regs. No. 9 (July, 1907) for OLEOMARGARINE.

Plaintiff's establishment is supervised and inspected by the Internal Revenue Department, the law (sec. 6) and regulations of which specially and especially apply to all branding, marking and stamping of Oleo (Act. Aug. 2, 1886, amended May 9, 1902).

The regulations of that Department are minute and specific and have been already sufficiently described.

The claim of defendants that "*Creamo*" is false or deceptive as a trade-mark ill comports with the Government's proposal to allow its use with the word "brand" added. That was a concession fatal to the claim now advanced, although the claim is inherently unsound, and borders on the frivolous, although we intend no disrespect to any of the officers of the Government by that observation. At best, their claim is untenable, we respectfully submit.

III

**The Meat Inspection Act does not apply to regulate marks and brands on Oleomargarine packages.**

The status of Oleomargarine and of Oleomargarine brands is specifically fixed and defined by the Special law and regulations in regard to them, in secs. 6 and 20 of the Act of Aug. 2, 1886 (24 Stat. 209).

The Court will observe that the Meat Inspection Act provides that no "meat or meat food product" shall be sold or offered by any person or corporation for sale in interstate or foreign commerce under any false or deceptive name. It is a matter of common knowledge as well as of science that while oleomargarine is often a meat product, it may also be made from materials containing no meat whatever (Rec., p. 88). In view of the fact that Congress has seen fit to apply to a special product a defined name: "Oleomargarine", and that this name appears on that product in plaintiff's label; the latter, in that respect, certainly complies with the Meat Inspection Law.

A reading of Section 6 of the Oleomargarine Act of Aug. 2, 1886, will satisfy experienced Judges that it fully covers the matter of marking and **branding**

Oleomargarine. Plaintiff, following that section of the law, has complied fully with all its requirements and with all the regulations under that law. It submitted the word "**Creamo**" as a suitable brand to the Internal Revenue Department, in 1904, and it was fully approved in the form in which it has been used ever since.

Abundant authority exists for the trite rule that special legislation takes precedence over any general statutes or language, even on the same subject. In view of the fact that the special Oleomargarine Law sets out **specifically** how the product shall be marked and branded, it should follow that the general law (if it applies at all) would not apply to those matters specifically covered by the Special Act applying strictly to Oleomargarine.

But a reading of the Meat Inspection Law will disclose that it is wholly and purely a law covering the inspection and sanitation of meat packing establishments. If an Oleomargarine factory is a meat packing establishment, this law at most could only go to the sanitation and inspection of raw and finished products, and to such examination as would see that the label bears the true name of the **product**, which has long before been covered by the legislation defining that product as **Oleomargarine**.

It is undisputed in the evidence that the plaintiff protested against the attempt of the Bureau to revise the "*Creamo*" label (Rec., p. 51) and also against the inspection of its product under the Meat Inspection Law (Rec., p. 50) when it was first inaugurated; and the evidence also shows without contradiction that Oleomargarine can be manufactured from a selection

of oils which does not include any meat fats or animal fats (Rec., p. 88).

The Act of Congress (August 2, 1886) known as the Oleomargarine Law was passed, and as amended May 9, 1902, was intended to levy a heavy revenue tax and to protect the public from dealers selling oleomargarine for butter. It was thought necessary to use the Internal Revenue Department as a vehicle to accomplish that purpose, it being conceded that while Congress could not usurp the police powers of any State, it might impose and collect a revenue tax in the mode which was adopted. Incidental to the collection of that revenue, Congress saw fit to say on what manner of packages of the product it would collect that tax, and enacted that the product on which the revenue was to be collected should be **marked and branded** in a certain way. Furthermore, the law specified that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, should make all needful regulations for carrying into effect that law. Those regulations were made in great detail and some of them have been already quoted.

We respectfully submit that they are exclusive.

The Secretary of Agriculture has ruled that the Pure Food Law does not apply to butter or to the coloring of butter, as that is covered by specific legislation (the Oleomargarine Act, which defines both Oleomargarine and butter). We claim that it should, therefore, follow that, if the Pure Food Law does not apply to butter (because, as is held, incidentally the latter is covered in the Oleomargarine Law), then the Meat Inspection Law is within the same principle and should be held

inapplicable to the products within the terms of the Oleomargarine Law.

The rules of interpretation applicable to this branch of the case are well established.

> "Where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same or in another act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation rather than under a general description."
>
> 24 A. & E. Envy. Law (2nd ed.), 890
> Chew Hing Lung v. Wise, 176 U. S. 156
> Bogle v. Magone, 152 U. S. 623
> American Net, Etc., Co. v. Worthington, 141 U. S. 468
> Arthur v. Rheims, 96 U. S. 143
> Arthur v. Davies, 96 U. S. 135
> Arthur v. Stephani, 96 U. S. 125
> Arthur v. Zimmerman, 96 U. S. 124
> Arthur v. Lahey, 96 U. S. 112
> Movius v. Arthur, 95 U. S. 144
> Dieckerhoff v. Miller (C. C. A.), 93 Fed. Rep. 651
> Zante Currants, 73 Fed. Rep. 183
> U. S. v. Davis (C. C. A.), 54 Fed. Rep. 147
> Smythe v. Fiske, 23 Wall. (U. S.) 374
> Reiche v. Smythe, 13 Wall. (U. S.) 162
> Homer v. Collector, 1 Wall. (U. S.) 486

The same rule applies where an article is specifically designated as exempt from duty.

> Chew Hing Lung v. Wise, 176 U. S. 156

And that rule is asserted in a vast array of decisions of which a few only need be cited.

> Hayes v. U. S., 150 Fed. 63
> U. S. v. Borden, 133 Fed. 840

"It is an established rule of construction that, where there are both general description and specific designations of an article in the same act, it is the intention of Congress that the article be classified by its specific designation, rather than under the general description."

Homer v. The Collector, 1 Wall. 486 (490)
Reiche v. Smythe, 13 Wall. 162 (165)
Smythe v. Fiske, 23 Wall. 374 (380)
Movius v. Arthur, 95 U. S. 144 (146)
Arthur v. Lahey, 96 U. S. 112 (113)
Arthur v. Stephani, 96 U. S. 125 (126)
American Net Co. v. Worthington, 141 U. S. 468 (474)

On these decisions we respectfully submit that there is no jurisdiction in the Department of Agriculture to control or regulate the marks or brands on packages of Oleomargarine in so far as the details of branding and marking them are covered by the specific regulations and directions in the Internal Revenue law, as to Oleomargarine.

Meat inspection by the Department of Agriculture (B. A. I.) is authorized for "meat and meat food products" by the law of June 30, 1906. Oleomargarine is not mentioned in that Act, and the whole tenor thereof shows it is not intended to supplant the revenue laws as to trade labels on Oleomargarine (Act of Aug. 2, 1886) which (sec. 14) also provide for inspection of ingredients of Oleo and a hearing if same be supposed to contain deleterious ingredients. Oleo is defined by sec. 2 of the Act of Aug. 2, 1886; it can be made (as so defined) without any material which might properly be classified as a meat food product (Rec., p. 88).

It is a general rule (often applied by the U. S. Su-

preme Court) that specific provisions of law as to one subject are paramount and controlling as to that subject, despite a general law (either prior or later) covering a larger class, including also the one subject. It has often been so held as to revenue laws, as well as other laws.

U. S. v. Nix, 189 U. S. 205
Hartranft v. Langfield, 125 U. S. 135
Seeberger v. Cahn, 137 U. S. 97
Am. N. & T. Co. v. Worthington, 141 U. S. 468

That is one of the large features of this case. We hope it may have close attention now that plaintiff, much against his will, has been obliged to invoke the aid of the Courts to protect its trade-mark, and the label thereof.

To state our contention briefly, it is this: that the meat inspection amendment (June 30, 1906) is not intended and cannot be construed properly to apply to the Oleomargarine industry so far as to regulate the brands used on Oleomargarine, because the Revenue laws governing the manufacture and sale of Oleomargarine declare explicitly as follows:

"Section 6, Act of August 2, 1886:

> "That all Oleomargarine shall be packed by the manufacturer thereof in firkins, tubs or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe", etc.
>
> (Regulations, 1907, Oleo. p. 7)

Under the foregoing statute, a series of minute regu-

lations have been made by the Commissioner of Internal Revenue, a few of which we mention (Regulations No. 9, July, 1907), U. S. Intern. Rev. The brand or stencil on every package of Oleomargarine (before removal from the factory) is prescribed (p. 39) and the letters and figures of the brand must be of a certain dimension. The use of private marks (or trade-marks) is carefully provided for as follows (p. 40):

> "If manufacturers of Oleomargarine desire to place upon the outside of their original wooden package, contemplated in Section 6 of the Act of August 2, 1886, their names, or some word or mark descriptive of the quality of the product, they may do so, provided they also brand or stencil on the package the word "Oleomargarine" beneath such name, word, or mark, so as to be read as a word in association with such name, word, or mark; and, if desired, figures and words may be added, indicating the form or manner in which the contents are packed, as shown in the following illustrations:

| | |
|---|---|
| JOHN DOE,<br>Manufacturer of<br>OLEOMARGARINE.<br>50-1-lb. Plain Bricks. | RICHARD ROE,<br>Manufacturer of Perfection<br>OLEOMARGARINE.<br>Solid. |
| JOHN DOE,<br>Manufacturer of Standard<br>OLEOMARGARINE.<br>20-1-lb. Fancy Rolls, Short | RICHARD ROE,<br>Manufacturer of Crescent<br>OLEOMARGARINE.<br>52-1-lb. Rolls, Long. |

> "Provided, the word 'Oleomargarine', as used in such labels, marks, brands, etc., is branded or stenciled in plain roman letters, not less in size than the letters used in the manufacturer's name, with the word describing the brand in letters not greater than one-half that size.

"And provided, also, the figures and words describing the form in which contents are packed be not greater than one-half the size of the letters prescribed for the word 'Oleomargarine'."

The next page of the same regulations is devoted to details of regulation on this subject. Pages 38 to 40 of the above regulations should be carefully read. They show to what extent of detail the internal revenue regulations deal with the brands on Oleo packages. The Oleo law is very special on this subject.

Of course, we know that Congress might, if it saw fit, provide that trade brands on Oleomargarine packages might also be revised and inspected by another Department (so far as interstate shipments are concerned); but our question now is: has Congress shown, by the laws, such an intent. We think not. Our claim is that the general language in the Meat Inspection (B. A. I.) law of June 30, 1906 (as amended to this date) does not have that effect. It is expressed in terms to apply to "meat and meat food products" in general; but all through the long lines which follow that general description of the subject of the act, we see careful directions as to the slaughtering, packing, meat-canning and rendering of "cattle, sheep, swine, and goats". We see directions for post-mortems of those animals, and provisions as to their carcasses. If you will read the Act throughout (and it appears in a convenient form for that purpose in the B. A. I. "Regulations for Meat Inspection". Order 150, effective April 1, 1908, pp. 45-48) you will see no word or phrase which could possibly suggest a purpose to submit the brands on Oleomargarine to the inspection provided by that law

or to remove those brands and trade-marks from the supervision and inspection provided, in much detail, by the Internal Revenue regulations concerning the product in question, known by the trade name of *oleomargarine*.

Now, in this state of the statutory law, well-known rules should be applied. The special provisions of the Internal Revenue law exclude application of the more general provisions of the Meat Inspection (B. A. I.) statutes, even if the latter would by their terms otherwise apply to Oleomargarine.

To quote Chief Justice MARSHALL:

> "That a law is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged."
>
> Pennington v. Coxe, 2 Cranch. 52

All statutes *in pari materia* should be considered, and "the general language found in one place may be restricted in its effect to the particular expressions employed in another", if such appears to have been the intent of the enactment.

Homer v. Collector, 1 Wall. 302 ("Almonds" case)
Atkins v. Disintg. Co., 18 Wall. 301-2
U. S. v. Nix, 189 U. S. 205

Judge PHILLIPS on this subject has said:

> "It is among the recognized canons for the con-

struction of statutes that, when the legislature resort in an enactment to much more special provisions respecting a given matter or offense, it must be taken and understood as an exception to the more general provision or general statute, especially so in the interpretation of criminal laws. This rests upon the doctrine that, 'where the harmony of the law requires, one statute will be construed as cutting short, that is, curtailing the effect of another'. So that 'a thing given in particular shall not be taken away by general words.' "

State v. Green, 24 Mo. App. 231

This principle has been shown by legislation in England.

In the English statutes concerning Pure Food and Drugs (as lately amended) there is express mention made of Margarine, in order to bring the latter within the terms of the former, because Margarine was treated (as in the American law) specially and separately in another statute on that particular subject. These English statutes demonstrate our point by acting clearly in accord therewith.

See 62 and 63 Viet. c. 51 (1899)
(Margarine) 50 and 51 Viet. c. 29 (1887)

In America the Regulations of the Internal Revenue Commissioner, as to marking and branding Oleo packages, have the force of law, and plaintiff is and has been following same to the letter, and the statute is clear as to the mode of branding Oleo packages.

Act Aug. 2, 1886, sec. 6, U. S. Int. Rev. Regs.
No. 9 Oleo, pp. 7; 38-42

We claim that said law and regulations should be

held exclusive, in the absence of any showing of a different legislative purpose. Over fifty decisions can be found as to special provisions being paramount to general terms in statutes.

26 A. & E. Ency. L. (2 ed.) p. 618

We are well aware that the paramount precept of all construction of law is to reach the real intent of the terms of the law as disclosed by them. But the subordinate rules are helpful to reach that intent. Here there is nothing in the Meat Inspection law to indicate that it was intended to supplant or to repeal the terms of the special law already in force to govern the branding and marking of packages of oleomargarine.

IV

**The "Creamo" trade-mark is a valid one, in every and all aspects.**

It was not necessary to resort to definitions to vindicate the validity as a trade-mark of such a word as is here in question. It is original, fanciful, not generic, not descriptive of the trade product apart from its maker. It was selected to identify the "make" of its maker, and its value now is unquestionable. It carries a good will which is a most valuable species of property. Comparison with decisions is scarcely needful to support its validity.

If the Court was called on, as an original proposition, to decide whether "Creamo", as applied to Oleomargarine packages for sale could be a valid trade-mark, and the only objection was the assertion that "Creamo" was "false or deceptive" in itself (for there is no extraneous evidence to support any such claim)

would any well-informed Court hesitate to hold it a lawful trade-mark as against such an objection?

No court would regard such an assertion seriously without testimony to support it.

U. S. v. Coca Cola Co., 241 U. S. 265

The learned Brief for the Government (p. 11) asserts that "the statute prohibits interstate transportation of same" (referring to plaintiff's oleomargarine products) "because of its **deceptive name**". But that is the nearest approach to any suggestion or argument to show in what respect it is supposed that the term "*Creamo*", as applied to Oleomargarine (and always in connection with the name of that product) could possibly mislead or deceive any one. The word is an arbitrary term, original with the manufacturer, coined for its particular use. It is not to be found in any dictionary, or in any literature, prior to its construction as a trade-mark, to indicate a first-class quality of oleomargarine sold by plaintiff. We have already argued to some extent that no false or deceptive suggestion is in it. The Bureau officers probably imagine that because "Cream" is part of the word it must needs imply that cream is a constitutent of the product. Much research is not necessary to ascertain that cream itself is a term of various meanings.

*Cream* as a noun has at least seven definitions of which only one refers to "the oily or butyraceous part of milk" which gathers on top when the milk is left undisturbed.

*Cream* also has at least six definitions as a verb.

Murray, Eng. Dict. (1893), pp. 1149-50

One of its definitions by the last cited authority is this:

3. "The most excellent element or part; the best of its kind; the choice part; the quintessence."

We quote from another standard authority one of its 6 definitions of cream:

"4. The best part of a thing; the choice part; the quintessence: as, the *cream* of a jest or story"
Century Dict. (1911), p. 1337

Perhaps the inventor of the word "Creamo" as a trade-mark for its present use on Oleo packages had in mind the idea that this product was the "Cream o' Oleomargarine", or the **best of that article** (to follow literally one of the quoted definitions). To express excellence the word cream is of wide and familiar use.

The "Cream" trade-marks have been held good:

Braun v. Coyne, 125 Fed. 331
Price Co. v. Tyfe, 45 Fed. 799

If "Cream" is good, "Creamo" is certainly a more fanciful and less descriptive, less generic word or brand for a trade-mark.

See as to good marks:

"Taylor's Persian thread"
Taylor v. Taylor, 2 Eq. Rep. 290 (23 L. J. Ch. 255)
"Dunn's Fruit Salt baking powder" (41 Ch. D. 439)
"Sliced animals" (a confection), 93 N. Y. 59
"White House" coffee
Dwinell-Wright Co. v. Co-operative Supply Co., 148 Fed. 242

In 1882 in a case in New York, plaintiff sued for an injunction on a "claim to the exclusive use of the word ALDERNEY in connection with Oleomargarine". The Court (per Judge Van Brunt) held:

"In respect to Oleomargarine, the use of the word 'Alderney' is entirely arbitrary and in no respect descriptive of the article, and the case of Hier agst. Abrahams (82 N. Y. 519) sustains as a trade-mark application of such arbitrary word, even if used in conection with others" (489).

Lanferty v. Wheeler, 63 How. Pr. 488

It appears scarcely necessary at present to refer to more than a few cases, sustaining our mark, as the Government does not appear to dispute its validity.

When a trade-mark has been established and approved three or four times, and has been long used and a valuable good will built up, where is the statutory power in the Department of Agriculture to deprive plaintiff of its property-right therein by its withdrawal and reversal of prior approval and rulings of its predecessors?

This identical point was decided positively in regard to the issue of a patent, holding that when granted there is no power to reverse that order by those authorized to issue the patent. We respectfully submit that a trade-mark such as ours is governed by the same principles as a patent, there being no existing provision of law authorizing the B. A. I. to reverse and cancel the approval given to such use.

McCormick v. Aultman, 169 U. S. 609

That ruling is based on an important principle, applicable also to the case at bar.

The great stress in the learned brief for the Government is laid on the claim that the Federal Bureau officers have a continuous, uninterrupted and inexhaustible power to approve or to revoke or revise trade labels or marks; and

that their action approving or revoking the use thereof is not subject to any judicial review. To support that contention we observe the Government cites a decision of the District Court in New York under the tea inspection Act of March 2, 1907, in which the powers of the Board of Examiners of tea were considered.

Macy v. Browne, 215 Fed. 456

But an appeal was prosecuted from that ruling, and the judgment of Judge Hough was reversed, the Court of Appeals in an opinion by Judge Lecombe (Judges Coxe and Ward concurring) holding that the Examiners of tea had exceeded their powers. It was held:

> "Within the field of investigation confided to them, the Board of Examiners are the sole judges; but they have been given no authority to extend the field of investigation beyond the limits staked out by Congress."
>
> Macy v. Browne, 224 Fed. 361 (reversing same case, 215 Fed. 456)

That ruling expresses the ground of our present suit, that the honorable officers of the Department of Agriculture are to restrain their authority within the field staked out for them by Congress.

The citation of other decisions concerning the scope of executive powers involving discretion reveals nothing in conflict with our contentions. Several of the citations refer to the discretionary powers of the U. S. Land Department in reference to the disposal of public lands. One decision which is cited is a fair type. It holds that the Interior Department decision on a subject within their discretionary powers is final, but the Court (per Mr. Justice Brewer) adds that it is "equally true" that "the action of the Land Department cannot

override the expressed will of Congress, or convey away public lands in disregard or defiance thereof".

Burfenning v. Ry., 163 U. S. 323

That ruling is in principle the same as was announced in the last Macy v. Browne decision.

See, also, City v. Ry., 216 Fed. 735

It may be well to ask whether, if the finding of the Department is to be treated as conclusive, the plaintiff may not rely on the "conclusive" effect of the approvals of its trade-mark "Creamo" by the same Department in 1907 and in 1912, as well as by the Interior Department in 1904?

No attempt has been made by learned counsel for the Government to point out any statute giving power to withdraw an approval after it has been acted on for years and large sums have been expended on the faith of that approval.

There has been no change of circumstances.

"*Creamo*", as a brand on the product to be sold, has not changed in meaning since 1904. It was as suggestive then as now, and so in 1907 and 1912, when the Department of Agriculture approved it, officially and after considerable attention to details of the label submitted (Rec., pp. 39-54). The superior officers in charge prior to 1913 doubtless had the proper idea that "Creamo" was a fictitious, original word, proper as a trade-mark, and that, if it suggested anything, it was merely the claim of the owner to superior excellence in the product designated thereby.

> "One may make a trade-mark out of a name or phrase which has some element of suggestion about it. 'Ceresota' is a good trade-mark for flour, although perhaps it is made up by the addi-

tion to the name of the goddess of grain of the last two syllables of the three hard wheat states of Minnesota and the Dakotas."

Chapin-Sacks Co. v. Creamery Co., 231 Fed. 550

But, we should not prolong this argument.

That the remedy by injunction is appropriate, if our other grounds of suit are well taken, seems clear on principle and authority. The remedy by injunctive orders and decrees to protect property has been so often granted in similar circumstances to prevent official action in excess of statutory powers that it seems scarcely needful to go further than cite a few familiar instances thereof.

Noble v. Logging Co., 147 U. S. 165
Caldwell v. Robinson, 59 Fed. 653
Hoover v. McChesney, 81 Fed. 484
La Chappelle v. Bubb, 69 Fed. 482
Bank v. Merchant, 18 Fed. 841
Kirwan v. Murphy, 83 Fed. 275 (this Court)

We respectfully submit that the decree of the District Court is in accord with equity, sound principle and fair dealing between the Government and its citizens, and that it should be affirmed.

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November, 1916